IN THE

Supreme Court of the United States.

October Term 1904.

No. 44.

THE SAN FRANCISCO NATIONAL BANK,

Appellant,

vs.

WASHINGTON DODGE, AS ASSESSOR OF THE CITY AND COUNTY OF SAN FRANCISCO,

Appellee.

Brief in Reply.

In the statement of the case, by an inadvertence we omitted to set forth certain portions of the Political Code of California, to which reference was made in the brief, and we now insert the same.

Title IX of Part III of the Political Code, beginning with Section 3607 and ending with Section 3899, treats of "Revenue," and therein will be found the entire tax system of the State.

> "Section 3617. DEFINITION OF TERMS. Whenever the terms mentioned in this section are employed in this act, they are employed in the sense hereafter affixed to them: * * *

Fourth. The term "personal property" includes everything which is the subject of ownership, not included within the meaning of the term "real estate" or "improvements."

Fifth. The terms "value" and "full cash value" mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor.

Section 3627. PROPERTY, HOW ASSESSED. All taxable property must be assessed at its full cash value.

Section 3635. ASSESSMENT OF UNKNOWN OR ABSENT OWNERS OF PROPERTY. If the owner or claimant of any property, not listed by another person, is absent or unknown, the assessor must make an estimate of the value of such property.

Section 3641. PROPERTY OF FIRM OR CORPORATION ASSESSED WHERE SITUATED. The property of every firm and corporation must be assessed in the county where the property is situate, and must be assessed in the name of the firm or corporation.

At the time the assessment considered in Miller vs. Heilbron, 58 Cal. 133, was made, Section 3640 read:

"Each person, firm, or corporation owning or having in his or its possession any of the shares of the capital stock of any corporation, association, or joint-stock company, shall be assessed therefor. If the corporation, association, or joint-stock company has its principal place of business in this State, the assessable value of each share of its stock shall be ascertained by taking from the market value of its entire capital stock the value of all property assessed to it, and dividing the remainder by the entire number of shares into which its capital stock is divided. The owner or holder of capital stock in corporation, associations, and joint-stock companies whose principal place of business is not within the State, must be individually assessed for such stock. Sharehold-

ers, in the statement required by Section 3629 of this code, shall specify the number of shares of stock held by them, and the name of the corporation. The owner of shares of stock, to be entitled to the reduction provided for in this section, must produce to the Assessor a certificate of the assessment of the property of the corporation, association, or joint-stock company." (pp. 137-138.)

It is also thought proper to insert the entire text of Section One of Article XIII of the Constitution of California:

"All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership; provided, that growing crops, property used exclusively for public schools, and such as may belong to the United States, this State, or to any county or municipal corporation within this State, shall be exempt from taxation. The Legislature may provide, except in the case of credits secured by mortgage or trust deed, for a reduction from credits or debts due to bona fide residents of this State."

In the opening brief attention was called to the first important point involved in this appeal. We then said that our attack upon the law in question was at the outset founded upon the proposition that the taxation of national bank shares and the exemption of commercial State bank shares created an unlawful discrimination in violation of the provisions of Section 5219 of the Revised Statutes, and we claimed that the taxation of the corporate

property of the State banks did not avoid the objection for the reason that as matter of law the taxation of the corporate property is not the equivalent of the taxation of the shares.

The brief of the counsel for appellee calls in question not only the reasoning of the opening brief, but also the pertinency of the authorities cited in its support. The argument of the counsel for appellee proceeds generally upon the proposition that this Court will not interfere with the action of the State if it appears that under its system, as interpreted by its Courts, the taxation of the two classes of property in the mode provided is equal. Without conceding the proposition, we may yet consider whether the Courts of California have interpreted its revenue system so as to give it the meaning attributed to it by counsel.

The case of Burke vs. Badlam, 57 Cal. 601, is the authority furnished to support the contention. The Court will read the case in vain to find any expression of opinion on the point involved. Nowhere in that case is it said that the "full cash value" of a share of stock in a commercial banking corporation is fixed or determined by the value of the corporate property. The Court could not have said any such thing, because common knowledge and experience teach us the opposite. The Court did say that when all the corporate property was assessed, then the shares were assessed. That may be conceded and yet it does not follow that if the shares were assessed as such, the valuation would be that placed on the corporate property. The Court was dealing with a question of double taxation, not with one involving the equivalency

of value, and it held that the corporate property and the shares were so closely united that to tax both would be double taxation. That was the only question before the Court and was the only one decided, and we submit that the opinion should be read in view of the question under consideration, because, as will be seen, such is the only way in which the Court can be saved from a clear and manifest inconsistency; and when read as we suggest this Court will we submit fail to find any rule declared which can be said to sustain the present statute of the State.

But if as claimed by counsel, it be true that the Court in Burke vs. Badlam, did hold that the shares were the taxable equivalents of the corporate property, then, as will be seen hereafter, that Court is brought into direct conflict with itself and with the highest tribunal of the land and the one before which this cause is pending.

Owensboro Nat. Bank vs. Owensboro, 173 U. S. 664.

The case of Burke vs. Badlam (supra) was decided in the month of January, 1881. In May, 1881, the same Court, composed of the same Judges, decided the case of

Miller vs. Heilbron, 58 Cal. 133.

In that case the Court was called to and did pass upon the precise and identical point with which we are now concerned. The question there was as to the validity of a law designed to authorize the taxation of national bank shares.

Section 3640 of the Political Code of California, as it stood when Miller vs. Heilbron arose, provided as stated

by the Court, "for taxing his shares to each person owning any of the shares of the capital stock of any corporation, association or joint stock company—including incorporated National Banks." It provided further that the assessable value of each share should be ascertained by taking from the market value of the entire capital stock of the corporation the value of *all property* assessed to the corporation and dividing the remainder by the entire number of shares."

Realizing that the Court would probably, as it did hold that the law created a discrimination unfavorable to the holders of national bank shares, the Attorney General was driven to take the exact and precise position which is here assumed by counsel for appellee. The attention of the Court was called to the rule behind which the supporters of unjust taxation always endeavor to shield themselves, that mere inequality, however gross, does not authorize relief; and then he proceeded to argue that inasmuch as all the personal property was assessed to the corporation, and as the shares represented and stood for the corporate property, an equivalency was established. In concluding his brief, the Attorney General of California said:

> "In this case it was the object of the State to collect revenue upon the full value of all the shares of the bank, as it does upon all other classes and kinds of property. This it was authorized to do by the Act of Congress, and it makes no practical difference to the shareholders of the several classes of corporations, whether they directly pay the whole of the tax upon the full value of the shares, or whether a portion of it is paid in some other form, by the corporations, and deducted from the dividends of the shareholders."

That we submit is the proposition on which counsel for appellee now rests.

In considering the argument, the Supreme Court of California said:

> "It is no sufficient answer to this suggestion to say that, by the State law, the personal property belonging to a State bank was assessed to the bank, and so the tax thereon was indirectly paid by the individual shareholders. The restriction of the United States statute is, that the taxation to the individual 'owner or holder' of shares of a National Bank shall not be at a greater rate than is assessed upon any other moneyed capital 'in the hands of individual citizens of the State.' It would be a strained interpretation of the statute to hold that a proportionable part in value of the personal property belonging to a State bank, and assessed to it, was 'in the hands' of an individual shareholder in such bank. It was in the power of Congress to confer upon the State the right to tax shares in National Banks with any limitations deemed proper. It has conferred the right to tax each individual owner of such shares, provided such taxation is not at a greater rate than is imposed upon any other individual who has moneyed capital invested in any other manner. (58 Cal. p. 141.)

Further along in the opinion, the Court also said:

> "If the code had provided that the value of all the shares of a National Bank should be assessed to such bank, the provision would be in excess of the power conferred by the act of Congress, and could not be upheld upon the propostion that the tax was indirectly imposed upon the shareholders. Without doubt, then, the act of Congress by its terms recognizes a distinction between taxation to the bank and taxation to the shareholders. The former is prohibited, the latter is permitted. So far as corporations

> are concerned, the subject of taxation, in respect to which the taxation must be ratably the same, are *the shares* of National Banks and *the shares* of State corporations—in such case 'in the hands of individuals.' *In view of the language employed in the act of Congress, a tax imposed upon a corporation is not the equivalent of a tax imposed upon its shareholders.*"

In view of the foregoing language, we submit that it is not doing justice to the Judges of the Supreme Court of California to say that in January they deliberately decided as correct law a proposition which they as deliberately repudiated in the following May; but if the cases are opposed, then of course the last must be accepted. But the two cases should be regarded in view of the questions involved, and when so regarded, there is no conflict, and taking the case in which was directly involved the point here in discusson, we find the Supreme Court of California placing itself squarely upon the doctrine for which we are contending.

"In view of the language employed in the Act of Con-"gress, a tax imposed upon a corporation is not the "equivalent of a tax imposed upon its shareholders." That proposition has never been denied or doubted in the Supreme Court of California, but has always been followed. In the latest case before the Court, the concluding sentence of the opinion reads:

> "In Owensboro Nat. Bank vs. Owensboro (supra) the Court held that the contention herein urged, that a tax against the bank upon its personal assets was equivalent to a tax upon its shares, was untenable."
>
> First National Bank vs. San Francisco, 129 Cal. 96-98.

The Supreme Court of California has been consistent and in the last case upon the point has adhered to the ruling made in the first one where it was raised. Hence, it must follow that if, as claimed by counsel, this Court is to take as its guide the Supreme Court of California, then we stand upon safe and sure ground. But to us it does not appear necessary that this Court should be required to determine the status of the rule in California or elsewhere, when it has itself and in an exhaustive opinion settled the question.

Owensboro Nat. Bank vs. Owensboro, 173 U. S. 664.

It will not be needful for us to go at length into a discussion of the questions decided in this case, because the counsel for appellee agrees with us that the Court did there hold that the assessment of the tangible property and franchise of a bank was not the equivalent of the taxation of its shares. (Brief of appellee, p. 37.)

However, it may be said that in Kentucky, the State dealt with, the property of the National and State Banks, as in Ohio, was done with the shares, and in the first instance the law was held invalid because the shares were not taxed. Had the course adopted in Ohio been followed in Kentucky, the result would probably have been different. In Kentucky, all banks, both State and National, were treated alike. There was no discrimination in fact. All were made to submit to precisely the same procedure. They were required to file with the Auditor certain statements showing, among other things, the amount of capital stock, the number of shares, the amount of stock paid up, the par and real value thereof, the highest price at

which such stock was sold at a bona fide sale within twelve months next before the fifteenth day of September of the year in which the statement was required, the amount of surplus fund and undivided profits, and the value of all other assets, the total amount of indebtedness as principal, the amount of gross earnings, or income, including interest on investment and income from all other sources for twelve months next preceding the fifteenth day of September, the amount and kind of tangible property in the State and where situated, assessed or liable to assessment in the State and the fair cash value thereof (see note, pp. 671, 674). Supplied with this statement from every State and National Bank, the taxing officers proceeded to fix and determine the assessable value of the property of each of such banks.

This Court held the law invalid because repugnant to the provisions of Section 5219 of the Revised Statutes.

That the question was broadly treated and not decided as it might have been upon a bare statement of the Act of Congress will be seen from the manner in which this Court approached its consideration. It is said:

> "It is, however, urged that whilst the taxes may not be in form imposed on the shares of stock in the names of the shareholders, and may be in form a tax on the franchise or property of the bank, nevertheless they are equivalent to a tax on the shares of stock in the names of the shareholders, and therefore do not violate the act of Congress. But this proposition concedes that the taxing statute does not conform to the act of Congress, and yet invokes its permissive authority, since, as already shown, without the grant made by the act of Congress there would be no power to tax at all. Passing, nevertheless, this contradiction, and looking beneath the mere form,

we come to the substance of things. The alleged equivalency, in order to be of any cogency, must of necessity contain two distinct and essential elements —equivalency in law and equivalency in fact. Does it contain either? is the question." (p. 676.)

And thereupon the Court proceeds to say:

"To be equivalent in law, involves the proposition that a tax on the franchise and property of a bank or corporation is the equivalent of a tax on the shares of stock in the names of the shareholders. But this proposition has been frequently denied by this court, as to national banks, and has been overruled to such an extent in many other cases relating to exemptions from taxation, or to the power of the States to tax, that to maintain it now would have the effect to annihilate the authority to tax in a multitude of cases, and as to vast sums of property upon which the taxing power is exerted in virtue of the decisions of this court holding that a tax on a corporation or its property is not the legal equivalent of a tax on the stock, in the names of the stockholders."

In commenting upon the case of Van Allen vs. Assessors (3 Wall. 573), the Court said:

"The other question in the case was thus stated by the Court, through Mr. Justice Nelson, page 581:

"'The main and important question involved, and the one which has been argued at great length and with eminent ability, is, whether the State possesses the power to authorize the taxation of the shares of these national banks in the hands of stockholders, whose capital is wholly vested in stock and bonds of the United States.'

This question was examined, and it was decided that, as the shares of stock in the hands of the shareholders were distinct and different subjects-matter of taxation from the property or rights of the bank, that therefore the power conferred by Congress

should be exercised so as to tax the shareholders even although the property of the bank was invested in non-taxable bonds of the United States, because the two were distinct and different things.

It is to be remarked that it is patent from the opinion of the court that, if the shares of stock had been considered as in anywise the equivalent of the bonds, in which the property of the bank was invested, the tax would have been held invalid, despite the authority to tax the stock given by the act of Congress, as such authority would not have been construed as authorizing a violation of the faith of the United States by taxing bonds issued by the Government which were not subject to taxation."

Referring to the cases which will be found in the brief of appellee and upon which counsel relies, it is said:

"It has been suggested that other cases decided since the cases referred to, whilst not questioning the latter, in effect admit a doctrine which tends to a contrary result. We do not stop to review in detail the cases from which this result is claimed to arise. They are

Palmer v. McMahon, 133 U. S. 660;
Bank of Redemption v. Boston, 125 U. S. 60;
Davenport National Bank v. Davenport Board of Equalization, 123 U. S. 83;
Mercantile Bank v. City of New York, 121 U. S. 138.

"It suffices to say that the claim is devoid of foundation. In all the cases referred to the taxation was specifically imposed on the shares of stock in the name of the shareholders, and the question presented, in various forms, was whether the provisions of state taxing laws, created a discrimination in favor of other moneyed capital and against the shareholders in national banks, contrary to the act of Congress. On these questions, interpreting the act of Congress with the liberality of construction resorted to in the *Van Allen case* and those which

followed it, the court in most of the instances rejected the charge of discrimination. The result of the cases in question tended to give efficient vitality to the grant of Congress to tax the shares of stock in the names of the shareholders. The argument now relied on would, if it were adopted, operate to destroy the power to tax, which the act of Congress sanctions.

"It cannot be doubted that, as a general principle, it is settled that the taxation of the property, franchises and rights of a corporation is one thing and the taxation of the shares of stock in the names of the shareholders is another and different one. This doctrine has been applied to sanction the taxation of the one where the other was covered by a contract of exemption. As the result of its application, it is unquestioned that much property has been brought within the range of the taxing power which otherwise would have escaped taxation. It is unnecessary to multiply citations on this subject, as the question has been in recent cases reviewed and restated fully by the Court. Thus in *Bank of Commerce* v. *Tennessee,* 161 U. S. 134, 146, it was said, through Mr. Justice Peckham:

" 'The capital stock of a corporation and the shares into which such stock may be divided and held by individual shareholders are two distinct pieces of property. The capital stock and the shares of stock in the hands of the shareholders may both be taxed, and it is not double taxation. (Van Allen vs. Assessors, 3 Wall. 573; People v. Commissioners, 4 Wall. 244, cited in Farrington v. Tennessee, 95 U. S. 687.)' " (pp. 680, 681.)

And on the point the Court concludes in these words:

"This follows since if mere coincidence of amount and not legal power be the test, only a pure question of fact would arise in any given case. The argument that public policy exacts that where there is an equality in amount between an unlawful tax

and a lawful one, the unlawful tax should be held valid, does not strike us as worthy of serious consideration." (p. 683.)

The views of the law which we find expressed in the foregoing are of course accepted by counsel on both sides of this case, and we only differ in the matter of their application.

We submit and respectfully insist that it is plainly and squarely held by this Court that as *matter of law* shares of stock in a banking corporation are not the taxable equivalents of the corporate property. In other words, one cannot be taxed for the other. Unless we read the opinion without understanding, it is held that in taxing the corporate property of a national bank, the shares are not taxed, and from that it must follow that in taxing the corporate property of a State bank, its shares are not taxed directly or indirectly.

If it be the true doctrine, as held by this Court, that by taxing the corporate property of National banks, its shares are not reached and are wholly exempted, then the same result must follow in regard to a State bank when the same thing is done. Then it will be seen that two things are shown to have occurred in California; in the year 1900:

1. The shares of all national banks in the State were valued, assessed and taxed at their "full cash" or market value;

2. The shares in commercial State banks amounting in value to thirty million dollars, and being investments brought into competition with the national bank shares,

were not taxed and were by reason of the statute wholly exempt (Record 81).

We mention these facts to show that the law in its operation fosters and creates a material discrimination unfavorable to national banks and tending to discourage investments in their shares contrary to the policy of Congress.

We desire, in closing our observation on this point, to cite

Adams Express Co. v. Ohio, 166 U. S. 221.

> "Suppose an express company is incorporated to transact business within the limits of a State, and does business only within such limits, and for the purpose of transacting that business purchases and holds a few thousands of dollars' worth of horses and wagons, and yet it so meets the wants of the people dwelling in that State, so uses the tangible property which it possesses, so transacts business therein that its stock becomes in the markets of the State of the actual cash value of hundreds of thousands of dollars. To the owners thereof, for the purposes of income and sale, the corporate property is worth hundreds of thousands of dollars. Does substance of right require that it shall pay taxes only upon the thousands of dollars of tangible property which it possesses? Accumulated wealth will laugh at the crudity of taxing laws which reach only the one and ignore the other, while they who own tangible property, not organized into a single producing plant, will feel the injustice of a system which so misplaces the burden of taxation." (p. 221.)

And with much greater cause of complaint can it be said that a shareholder in a national bank in California with his shares taxed at their full market value, viewing the happy state of his neighbor, a shareholder in a State

bank who sustains only a burden fixed according to the value of the corporate property may sadly "feel the injustice of a system which so misplaces the burden of taxation." And we entertain no doubt that "accumulated wealth" represented by the favored holders of shares in the State banks of California "laugh at the crudity" of its taxing laws.

Let it be suposed that instead of an express company it is a banking corporation whose corporate property is valued at a given amount, yet because it "so uses the tangible property which it possesses, so transacts business therein that its stock becomes in the markets of the State of the actual cash value" of millions of dollars in excess of the value of the corporate property. Would the rule of law be any different than that which the Court declares to obtain in the case of the express company? We submit that in both cases the rule will be the same.

It is submitted that sufficient appears to establish the invalidity of the law in question. When we come to consider the question as to whether or not, under the law of California, there is and must be an equivalency in fact, or a want of it, we are able from the record to make out, not only an entire want of any such equivalency, but a case of an onerous and unwarrantable descrimination to the disadvantage of the national banks and their shareholders. The contention of appellant is that under the system of assessment provided by Sections 3608 and 3609 of the Political Code of California, national bank shares are made to bear an unequal and unjust share of the burden of taxation because, in the first place, the

Assessor is required to start in an exactly different way in ascertaining directly the assessable value of national bank shares from that which he is obliged to follow to fix indirectly the tax burden on State bank shares; and because, in the second place, by the mode adopted in California a material discrimination must result between the burdens imposed upon the two classes of property growing out of the valuation of the one class and the total failure to value the other. And finally, that the record in this case shows conclusively that the shares of appellant suffered by reason of a discrimination which was systematically practiced in the City of San Francisco, and whereby State bank shares were largely favored even if it were conceded that the indirect mode of taxation could be sustained as an equivalent to the correct and only legal way of taxation.

In support of this contention we claim that in attempting to arrive at the semblance of an equality of taxation upon national bank shares and State bank shares, the Assessor cannot and is not allowed to start from the same point. He is obliged to begin his investigations at widely different angles. In the case of national bank shares, he is to find at the outset the market value of the property to be assessed, and in the case of State bank shares, he is to disregard any value they may possess and value other property, and thereby and in a roundabout way, impose a burden of taxation upon such shares.

In 1864, the State of New York maintained a tax system very much like that now existing in California. Shares of national banks were assessed at their par value, while the State banks were assessed upon their capital.

This would seem at first blush to provide for precise equivalents. The par value of the national bank shares would naturally be the amount of the capital. The courts of New York sustained the enactment, but this Court held it a nullity.

Van Allen vs. The Assessor, 3 Wallace, 573.

The reason given in the opinion is in effect that upon which we here rest in our resistance to the California statute, namely, that the assets of the State banks may consist in whole or in part of non-taxable things, and by reason of that fact the equality would and could not be preserved when national bank shares continued to be assessed at their value without regard to the character of the property in which the capital of the bank might be invested.

In New York, after several years of litigation, it was concluded advantageous to follow the true and only course and accept the evident intention and expectation of Congress when it enacted the provision now known as Section 5219 of the Revised Statutes, and then it was enacted as follows:

> "The stockholders in every bank, banking association or trust company organized under the authority of this State, or of the United States, shall be assessed and taxed on the value of their shares of stock therein."

It is to this condition of its revenue laws we claim the State of California must submit before it can lawfully impose any tax burden upon national bank shares. California stands alone in its obstinate refusal to abandon a system of assessment which has yet to find support in

any decision of this Court, and which has been abandoned by every other State in the Union.

The point we are just now endeavoring to bring to the attention of the Court may be illustrated by a consideration of the provisions of the law of Ohio, considered in Bank of Wellington vs. Chapman, 173 U. S. 205.

In Ohio, both national and State bank shares are assessed; but to arrive at their assessable value it is in effect provided that the assessable value of the shares of both classes of banks should be reached by a comparison with a sworn statement of their resources and liabilities. Hence and under the Ohio system, the two are placed on a substantial equality at the start. In arriving at the assessable value of the shares, both are placed on the same footing; and this Court, in the case last cited, well said that the statute of Ohio was to be considered as having been enacted "with no view to discriminate "against the holders of shares in national banks and with "the taxation of the shareholders in the two classes of "banks, State and national precisely the same." (pp. 214-215.)

The reason why the taxation of the shareholders in the two classes of banks in Ohio is precisely the same and hence no discrimination is created or fostered against national banks shares is because the basis for assessment is the same for both classes.

The difference between the Ohio system and that of California must be evident. In Ohio, as to both classes, the assessable value of the shares is the difference between the resources and the liabilities. In California, as to national banks, it is the difference between the market

value of the shares and the liabilities; and as to State bank shares, by indirection the difference between the resources and liabilities. And if, for any cause, a national bank share acquires a value in the market beyond the difference between the resources and liabilities of the bank, it must be valued and assessed at a higher rate than that which will be borne indirectly by the State bank share.

In arriving at the assessable value of a national bank share, the Assessor has certain well defined guides:

1. It must be valued and assessed as is other property. (Pol. Code, Sec. 3609);

2. It must be assessed at its full cash value. (Pol. Code, Sec. 3627);

3. By "full cash value" is meant the amount at which the property would be taken in payment of a just debt from a solvent debtor; that is to say, the market value, or the value of the share in the open market. (Pol. Code, Sec. 3617, Sub. 5.)

Hence, if the full cash value of a national bank share should be three hundred dollars, it must be valued at that sum, notwithstanding the fact that the difference between the resources and liabilities of the bank would show, as in the case of the indirect assessment of a State bank share, a value of only one hundred and fifty dollars.

That a bank share is a distinct property, separate and apart from the assets of the corporation from which it emanates, is not only a conclusion reached by reason, but is the conclusion of this Court.

In the Van Allen case (supra), this Court said:

"The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital during the existence of its charter, in proportion to the number of its shares; and upon its dissolution or termination, to his proportion of the property that may remain of the corporation, after the payment of its debts.

This is a distinct, independent interest or property held by the shareholder like other property that may belong to him.

Now it is this interest which the Act of Congress has left subject to taxation by the States under limitations prescribed" by Section 5219. (3 Wallace, 584.)"

(The italics are ours.)

In a much later and recent case, this Court, in speaking of a Statute of Utah where "true value" is the basis of assessment, said:

> "The true criterion as fixed by the Statute is the true value of the stock without reference to the question where or in what manner or nature of property the capital stock may be invested."
>
> Bank vs. Chambers, 182 U. S. 561.

Reading the two foregoing statements of the rule together and applying them to California, we observe that a share of national bank stock is to be treated as a distinct, independent interest or property to be valued for tax purposes at its market value, without reference to the question where or in what manner or nature of property the capital stock may be invested.

The share of a State bank is not, as such, assessed or taxed at all in California. In that State that kind of "distinct independent interest or property held by the

"shareholder, like any other property that may belong to "him" is wholly and absolutely free and exempt from taxation.

Thirty millions in value of such property, namely, State bank shares in California, coming into competition with Appellant bank enjoy this immunity from the burdens of State and municipal government. This splendid generosity on the part of the State redounds to the advantage of its own, while it hampers and retards the creations of the Nation.

Confronted with the system of taxation of California, we have no cause to further wonder why it is that the shares of appellant have only a full cash value of, and would only be taken in payment of a just debt from a solvent debtor at the sum of one hundred and sixteen dollars per share, or sixteen dollars above par, while the shares of its indulged and pampered neighbor in the same street and next block, the Bank of California, under exactly the same mode of valuation, are worth four hundred and five dollars per share, or three hundred and five dollars above par.

In California, the conditions are practically those of which this Court spoke in Bank vs. Chehalis, 166 U. S. 440:

> "A tax upon the money of individuals invested in the form of shares of stock in national banks would diminish their value as an investment and drive the capital so invested from this employment, if at the same time similar investments and similar employments under the authority of State laws were exempt from an equal burden."

The revenue system of California is, we submit, accurately described in the foregoing language, and its result is to establish and sustain a taxation which creates and fosters an unequal and unfriendly competition by favoring State institutions as against national institutions carrying on a similar business and operations and investments of like character. And when we stop to think that Government Bonds bearing interest at the rate of two per cent per annum, sell readily in the market at one hundred and five dollars each and thus give the purchaser interest at about one and eight-tenths per cent per annum, we must conclude that the saving of one and six-tenths per cent per annum would naturally and necessarily render one class of investment a favorite over another; and yet that is the stern fact with whch we are confronted in this case.

The rate of taxation in San Francisco for State and municipal purposes was one and six-tenths per cent and a little more (Record, page 79). The shares of appellant were assessed and taxed at their "full cash" or market value. The shares of State banks were not assessed or taxed and were exempt, but were indirectly assessed for a portion of the value or about 80 per cent.

Thus it appears that State bank shareholders enjoyed an advantage over National bank shareholders of about one per cent per annum interest upon their investments, which is certainly more than sufficient to justify the claim of discrimination.

In the Whitbeck case, 127 U. S. 193, a difference in valuation between sixty and sixty-five per centum valuation was held to be sufficient to establish a discrimination.

We would not be here complaining if our case did not present an altogether more glaring case of favoritism.

The points of departure in the matter of the valuation for taxation purposes of the two classes of property being different, the courses thereafter followed must and do constantly diverge.

Bank shares have two values: one is termed "Book Value"; another is termed "full cash or market value." This fact is generally recognized and acknowledged, and by reference to the statement set forth in the brief of appellee (pages 47-48) it will be seen that counsel and ourselves agree upon the existence of the different values.

"Book value" of a share of stock is the amount shown by dividing the sum of the net resources by the whole number of shares. To illustrate: The appellant has net resources amounting in value to $581,911.32, and that sum divided by 5,000, (the whole number of its shares) gives $116.38, as the "Book value" of each of such shares. The Bank of California, as shown by the record, has net resources of the value of $5,906,403.08, and that sum divided by 20,000 (the whole number of its shares) gives $295.32, as the "book value" of each of said shares; but if we add to the above amount the value of the franchise, then the book value of each share of stock of the Bank of California will be increased $37.50, or to the sum of $332.82.

Under the Ohio revenue system and which this Court in Bank of Wellington vs. Chapman (supra) pronounced consonant with the provisions of section 5219 of the Revised Statutes, the shares of the appellant bank would

have been valued at $116.38 each, and the shares of the Bank of California at $295.32, or it might be at $332.82.

"Full cash" and market value import the same thing.

"The phrases 'salable value,' 'actual value,' 'cash value,' and others used in the directions to assessing officers all mean the same thing."

Cummings vs. National Bank, 101 U. S. 162.

"The market value of goods is the price at which the owner of the goods, or the producer holds them for sale; the price at which they are freely offered in the market to all the world; such prices as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade."

Cliquot's Champagne, 3 Wallace, 125.

The market value of property then means the price at which it is bought and sold in the open market, that is to say its "salable value."

The cash or market value of a share of stock in a banking corporation should never be less, but usually exceeds the book value. Whether, and to what extent, the market value exceeds the book value depends upon many considerations. To some of them we have already called attention in the opening brief; but it may be said further that the shares of one bank will have a market value over those of another, because of the fact that the one is a bank of long standing, high credit, and known everywhere, and although its dividends may not exceed those of a more recently established and not as well known bank, yet, as a matter of common knowledge, we recognize that the shares of the older bank will be sought as

an investment in preference to those of the younger institution. Good name, to banks (though without souls) as "to man and woman born," is ever the "immediate jewel."

In this present record, we find an apt illustration of the fact just mentioned. As we have shown, the book value of the shares of the Bank of California, including the full cash value of the franchise, is $332.82 each; but we know, and it is conceded and agreed, that the market value of the shares is $405 each (Record p. 80). The cause for this discrepancy would not be hard to find. The Bank of California is the leading financial institution of the Pacific Coast States. Its reputation is of the highest possible order; its credit is beyond question; its business is extensive, and naturally, its stock is sought by investors and that fact enhances the price in the market.

The appellant bank is a much smaller concern, of more recent origin, not as well known or as thoroughly advertised as its big competitor across the street, and naturally its shares do not command the same price in the market. Again, and as we have already pointed out, the shareholders in the Bank of California enjoy an immunity from the taxation to which the holders of the shares in the appellant bank are subjected.

It has been frequently held that elements other than the assets enter into and aid materially in creating the market value of the shares of a corporation.

> "In Com. vs. Hamilton Mfg. Co., 12 Allen, pp. 302-303, the Court say:
>
> "'Undoubtedly the amount of property belonging to a corporation is one of the considerations which

enters into the market value of its shares; but such market value also embraces other essential elements. It is not made up solely by the valuation or estimate which may be put on the corporate property, but it also includes the profits and gains which have attended its operations, the prospect of its future success, the nature and extent of its corporate rights and privileges and the skill and ability with which its business is managed.'

And again on page 304:

"'These illustrations serve to show that an assessment based on the market value of the shares of a corporation or of the aggregate of said shares or capital stock cannot be properly deemed a tax on the property of the corporation.'"

"In Commonwealth v. Hamilton Mfg. Co., 12 Allen 302, 304, it 's said:

"The price for which shares are sold does not depend on the value or amount of property belonging to a corporation, but rather on the capacity of the corporation to use its property in connection with its corporate powers and privileges advantageously and profitably, and upon the present prosperity, prospective earnings and probable final results of the corporate business. It would seem to follow from these views that the valuation which the public put on the stock of a corporation as shown by sales and purchases of the shares, cannot be justly regarded as a valuation of the property of the corporation.'

"In People v. Barker, 59 N. Y. Supp. 926, 941, the Court said:

"'The capital stock of a company is one thing; that of the shareholders is another and different thing. That of the company is simply its capital, existing and tangible capital but also of surplus of the stockholders is representative, not merely of that existing and tangible capital but also of surplus of dividends earning power; of franchise and the good will of an established and prosperous business."

If it be true as claimed by Counsel that the Supreme Court of California has decided that the "franchise" fills the gap between the market value of the shares and the value of the tangible assets and must be so valued, then we say, with all due deference that the Court has simply undertaken to repeal an Act of the Legislature. The Statute does not say that the franchise shall be valued at any stated or arbitrary sum; nor does it say that the market value of the shares shall be considered in the matter, but it does say that all property shall be valued at its full cash value and full cash value is the sum at which the property would be taken in payment of debt, and if the Court has assumed the power of directing the assessors to pursue any different course it has done a vain and idle thing, but again we say that if the consideration did not arise it would still remain that the ruling of the California Court will be found opposed to the whole current of authority. We have already cited to this Court several cases showing that a number of elements other than franchise enter in the increase of the market value of the shares over and above the value of the corporate assets.

In this Court it has been said that while the franchise is one of the things that enter into the computation of market value, "the probable prospective capacity for "earnings also enters largely into the market value and "future possible earnings again depend to a great extent "upon the skill with which the affairs of the Company "may be managed. These considerations, while they "may enhance the value of the shares in the market, yet "do not in fact increase the value of the actual property

"itself. They are matters of opinion upon which persons "selling and buying the stock may have different views."

Pullman Co. vs. Transportation Co., 171 U. S. 154-5.

In a former case this Court said:

> "The capital stock of a corporation and the shares of a joint stock association represent not only tangible property, but also the intangible, including therein all corporate franchises and all contracts, privileges and good will of the concern."

Adams Express Co. v. Ohio, 166 U. S. 221.

And in the absence of authority, it would seem wholly too narrow a view to say that the franchise alone furnishes the cause for the market value of shares. We all recognize that to a bank credit, or in other words, the reputation of its solvency and probity which entitles it to be trusted, is the dominant and accepted factor in determining the market value of its shares, and without credit its shares are without value over and above the sum that would be paid in liquidation. This reputation is sometimes called good will, but by whatever term designated, it is after all that element which gives to the bank a standing and makes its shares an inviting investment.

In view of these holdings, it does not seem necessary to pursue further the citation of authority to establish the fact that the Supreme Court of California is either in error or misunderstood by counsel.

These considerations show why it occurs that the shares of the Bank of California have a market value far in excess of the book value. We submit that a

like state of fact exists as to all the commercial banks of San Francisco, and that such is a fair inference and conclusion from the agreed statement. (Record p. 80.)

Viewed in the most favorable light and granting everything claimed for it, the conclusion seems irresistible that in assessing the corporate property of a State commerical bank, the Assessor must and is confined to the ascertainment and valuation at their market value of the assets of the bank. He is presumed to do his duty, and so doing, he cannot place any other or higher valuation upon the corporate property. He is not concerned with the market value of the shares of State banks. Whatever that value may be, it does not enter into his calculation. As a matter of fact and when making the assessment, the Assessor does not reach the book value.

Banks usually own real estate, and in their statements and in the consideration of dealers in their stocks, such real estate is figured at is market value and should be so assessed.

The remarks of this Court in Cummings vs. National Bank, (supra) apply with particular force in California.

> "The constitutions and the statutes of nearly all the States have enactments designed to compel uniformity of taxation and assessments at the actual value of all property liable to be taxed." * * * "But it is a matter of common observation that in the valuation of real estate, this rule is habitually disregarded." (p. 162.)

And it is pointedly exhibited in this record.

In the statement of its resources designed for the study of the public and its present and prospective shareholders, the Bank of California valued its real estate at the

sum of $543,629.27 (Record, p. 80); but, when the appellee came to ascertain and assess the same real estate, its value had shrunk to $175,000, or less than thirty per cent of its value as given in the bank statement.

The value of the real estate given in the Bank statement was that which entered into and constituted a factor in determining the market value of the stock of the Bank of California. Buyers paid for the stock on the basis of value for the real estate at the sum of $543,629.27.

Had the Bank of California been a national bank, or had the same property belonged to a national bank, its shares would have been bought and sold upon a basis in the consideration of which the higher valuation would have entered and their market value would have been correspondingly affected and such shares would have been accordingly valued and assessed.

We have, we submit, the right to assume and claim that all other real estate enjoyed the same friendly considerations at the hands of the Assessor called to place a value thereon and that all other State commercial banks were favored in the same way; hence we see that in the instance given, there would have been a discrimination between the assessment as made and the assessment of the shares of $368,629.27, being the difference between the actual value of the real estate, $543,629.27, and its assessed value, $175,000. (Record 80-81.)

We do not know and there is nothing in the record to show with certainty the rule of valuation adopted by the appellee in arriving at the value of the solvent credits of the commercial banks; but we assume and have the

right, we submit, to assume that they were valued in much the same way as the real estate.

But, allowing for the moment and for the sake of the argument, the claim of counsel that the habitual violation of the law by the Assessor gives us no claim for relief, still we submit that at the very utmost the Assessor would have been limited in determining a basis for his assessment of the corporate property of the commercial banks of San Francisco to the book value thereof. Had he so proceeded, he would have found in the case of the Bank of California, real estate and personal property of the value of $5,906,403.08, to which he would have added $750,000, as the value of the franchise, making in the aggregate, as the full cash value of the "corporate property" of the Bank of California, the sum of $6,656,403.08. Dividing this amount by the number of shares, it shows the result of $332. 82 per share.

The amount stated is, we submit, the very highest figure at which the Assessor, acting under the solemnity of his oath and impressed with the obligations of his office, could have fixed the corporate property of the Bank of California; and yet we are told in this record that the shares of the Bank holding the property had a value in the market, and hence were bought and sold at the rate of $405 per share, or in the aggregate for the whole 20,000 shares of $8,100,000, or $1,443,597, or eighteen per cent in excess of the value at which the Assessor following the law fixed and was obliged to fix the value of the corporate property. A national bank holding the same property and with its shares at the same price would and could not have been allowed to enjoy any such exemption from

taxation. The sections of the Code 3608 and 3609, which we have quoted at large in the opening brief, would have estopped the Assessor, however much inclined to grant a national bank any such indulgence. And following the course of the assessment to its conclusion the Assessor, had the case been one of a national bank, would have valued the real estate in the way he did and made all deductions; but instead of finding the assessable value of the property to be assessed at $3,061,774, he would have been obliged to fix it at $5,254,871, an increase of one hundred and seventy per cent or thereabouts.

This showing applies with the same force to the cases of all the state commercial banks in San Francisco.

But it will not do, to offer as an escape from the effect of the showing we have made, to say that the Assessor may not have assessed the property of the Bank of California at its true value. The figures outside of the real estate furnish a contradiction to any such reply. The largest and principal item was "money $2,135,224.00." That item could be neither more nor less. As to the real estate, it may be the fact that some of it was situate outside of San Francisco. The other items were taken by the Assessor from the Bank's own statement not made for taxation purposes, and hence are not likely to have been undervalued.

But the learned counsel contends with much earnestness that because the "franchise" could have been assessed for a larger sum, the law is not to be attacked because of the apparent discrimination. The answer to this contention is that in this case it is conceded that the Assessor fixed the full cash value of the franchise of the Bank of

California at the sum of $750,000, or in round numbers at about nine per cent of the value of its shares, and that such was the manner followed in the valuation and assessment of the franchises of all the State commercial banks and trust companies in San Francisco.

The fact that the mode of assessment of bank franchises followed in San Francisco resulted in fixing their assessable value at nine per cent of the market value of the shares is alone sufficient to sustain the present action and justify our claim to the relief demanded.

To reach any sort of equality in the valuation, it would have been necessary for the Assessor to have fixed the value of the franchise of the Bank of California at the enormous sum of $2,943,096.92 or about thirty-five per cent of the value of its shares. He did not do anything of the kind or anything showing a desire to approximate it, and his manifest disregard of the requirements of Section 5219 of the Revised Statutes should entitle the appellant to relief. In this connection it is proper to remark that the tax in cases like the present and where levied on personal property not secured by real estate, collection is made immediately and prior to any opportunity for equalization and in the absence of any provision for payment under protest.

But we go further and submit that the statute itself is void, because no such valuation as that which counsel says the Assessor might have made is either contemplated or authorized. The statute requires that the Assessor shall value the franchise like other property at its full cash value, or at the sum for which it would be taken in payment of a just debt from a solvent debtor (Sec. 3617,

Pol. Code). It is true that the Supreme Court of California, by a bare majority, has held that property, to-wit, a franchise, which could not be sold and which could not be taken in payment of a debt, and of the value of which there is no method of ascertainment, can yet be taxed; still it has not held the Assessor can, arbitrarily and without reason, impose a grossly exaggerated value upon the property of a citizen. He has the plain language of the law for his guide. He must find the full cash value, or that for which the property would be taken in payment of debt and to say that he could value a bank franchise, its mere right to exist, at any sum as two million nine hundred thousand dollars is to say that in California the revenue system not only justifies but demands confiscation.

It has been held in California that a fraudulent assessment may be enjoined and that fraud appears whenever it is shown that the property in question is assessed "at "a valuation greatly in excess of its actual value and "greatly above that placed by the Assessors on similar "property of others."

Pacific Postal Tel. Co. vs. Dalton, 119 Cal. 654.

In a very recent case in the Circuit Court of the Eastern District of Kentucky, it was held:

> "In order to entitle one whose property has been fully valued for taxaton to complain of an undervaluation of other property and to relief in equity by having his own valuation cut down to an equality with that of the property undervalued, it is essential that the undervaluation should have been inten-

tional, and that it should have been systematic or habitual, relating to a large species of property."

Louisville & N. R. Co. vs. Coulter, 131 Fed. Rep. 282.

In that case the complaint was based upon the claim that the tangible property of the State was assessed for the year 1902 at eighty per cent of its value, while the property of the complainant was assessed at its full value and the Court held the showing sufficient to justify its interference.

Louisville Trust Co. vs. Stone, 107 Fed. 305.

There it was said by the Circuit Court of Appeals:

> "It may be conceded that, if the allegations of the bill are made out, there exists in respect to the property of complainant and others similarly situated, a systematic, intentional, and illegal undervaluation of other property by the taxing officers of the state, which necessarily effects an injurious discrimination against the property of which the plaintiff is the owner, and a bill in equity will be to restrain such illegal discrimination, and in such cases federal jurisdiction will arise because of the equal protection of the laws guaranteed by the fourteenth amendment."

In view of these cases it would seem evident that any attempt on the part of the Assessor to place any such valuation as three millions of dollars on the franchise of the Bank of California, in view of the manner in which he is shown to assess real property, would be met with an injunction.

In the consideration of this question as already said it must always be borne in mind that so far as the tax

of which the appellant here complains is concerned, it is made payable in ten days after the assessment is made.

> "And in case the tax on any such stock is unsecured by real estate owned by the holder of such stock, then the bank in which said stock is held shall become liable therefor; and the Assessor shall collect the same from said bank." (Sec. 3610 Pol. Code.)

The collection of the tax is authorized to be made and was demanded and seizure threatened long before the time appointed for the meeting of the Board of Equalization and prior to the levy of the tax or the fixing of the rate, and in the absence of any right to pay under protest and with nothing but the right to appeal to the Board of Supervisors for relief.

Further we submit that we have the right to say and to ask this Court to hold that the construction which the Assessor puts upon the statute is true and correct and binding upon him in this case. He is a sworn officer of the law and to some extent acts in a judicial capacity.

The Charter of the City and County provides:

> "The Assessor shall assess all taxable property within the City and County at the time and in the manner prescribed by the general laws of the State."
>
> Sec. 2, Art. IV, Chap. V.

Following the line of his duty, observing the requirements of Sections 3617 and 3627 of the Political Code, the Assessor of San Francisco has determined and adjudged that a proper construction and interpretation of the law requires him to value and assess the franchises of State Commercial Banks at about nine per cent of the market value of the shares. We are not called to consider the

act of another incumbent of the office, but here we have the identical assessor, whose judgment we claim is of binding force. It does not lie in his mouth to say that he was in error, or that he could have found in a different way. He has intentionally and in regard to all the commercial banks organized under the State authority, given a final decision as to the interpretation to be put on the tax laws. It may be said that he may change his views and reverse his opinion. Whether he can be allowed to do so in the future is not of moment now, because we are dealing with his conclusion as we find it in this record and by which he is bound. He has agreed that it was and is the fact that he valued and assessed all the franchises of the State banks at or about the rate we have named, and that concession on his part is in effect that such is his deliberate judgment of the true meaning of the tax law under which he acted. It would, we submit, be an unheard-of proposition that a judicial officer could in person and for his own benefit be heard to impugn his own judgment and claim that he knowingly and wilfully misjudged a case.

But if it be held that our contention is not correct as to the law itself, we still claim that in the present case a discrimination in fact appears, such as entitles the appellant to the relief demanded.

The Assessor fixed the full cash value of the shares of the appellant bank at $116 each. His duty was to do that particular thing at the outset. It matters not how he proceeded to arrive at his conclusion. He could have refrained from considering the assets of the bank if he so desired, and that he did consider them is merely evi-

dence of the manner in which he carried on his investigations. If the shares of appellant had possessed a market value, he would have taken that value as the basis of his assessment, but apparently they had no recognized market value, and he for that reason assumed the amount at which he began. There is nothing to be found in the law which authorized or directed the Assessor to take as proof of the full cash value of the shares the amount of capital and undivided profits. Such a selection was purely a voluntary act on his part and after all he must be held to have found the full cash or market value of the shares.

In proceeding to assess the Commercial State banks, he took the tangible assets, and to their value he added a valuation of the franchise fixed at the sum which he deemed it would be taken in payment of a just debt from a solvent debtor. In the case of the Bank of California had he pursued the course indicated by counsel as the law and correct one he would have valued the franchise at the difference between the market value of the shares and the value of the tangible assets, or at a value of $2,943,596.92; but he did not make any such valuation. He found the value of the franchise of the Bank of California to be $750,000, or in the neighborhood of thirty per cent of the value at which he should have fixed it if he had desired to arrive at anything resembling an equality with the valuation of the shares of appellant bank.

Taking the tangible assets and the franchise of the Bank of California together, the aggregate amount is the sum of $6,656,403.08, or eighty-two per cent of the value of the shares.

Hence under any view that may be taken of this case, it appears that the Assessor failed to avoid a very apparent and considerable discrimination as against the shares of appellant which he valued at their full cash value. In other words, he valued one according to provisions of the law, while he favored the other to an extent of nearly one-fifth of its worth.

In the case cited above, Louisville & N. R. R. Co. v. Coulter (supra), it appeared that the property of complainant was assessed at its "full cash value,"—as here in the matter of the shares of appellant,—while other property was assessed at eighty per cent of such value, which is substantially the fact appearing in this record as to the valuation of the corporate property of the local banks. The Court held the discrimination sufficient to avoid the tax and justify an injunction.

Again, this showing is made still more evident and convincing by the valuation of the real estate. In its own statement of its resources, the Bank of California valued its real estate at $543,629.27; but we will suppose that only the bank premises were situated in San Francisco, although nothing appears to show the fact. Then we find that such real estate was valued by the Bank at $250,000, which is to be taken as its market value, but the Assessor fixes the value at $175,000, or at seventy per cent of the market value; and striking an average of the valuation of the real estate and franchise, we find that the property of the Bank of California was assessed at seventy-six per cent of its full cash value; and this was the intentional and systematic course followed by the Assessor in regard to all State banks. In short it was designed and intended

to value their assets at about seventy-five per cent of the cash or market value, and this course of proceeding was systematic and will, if sustained in its first attempt, become habitual.

Counsel furnishes a statement in his brief (p. 47-48) by which he claims that the figures show that the appellant benefited by the assessment in question, while the matter is not material for the reason that we have the Assessor's judgment as to the value of the shares and must abide by that conclusion; yet it may be allowed to call attention to the fact that counsel treats the entire sum of the "loans and discounts" $1,382,338.39 as "solvent credits." Common knowledge teaches us that such assumption is wholly unwarranted, and it must be evident that the Assessor so concluded. Loans and discounts and even solvent credits when made may be considered good, but bankers often find them otherwise.

Referring once more to the Bank of California, it will be observed that it had no surplus of solvent credits, and yet all must know that its capital and surplus fund must have been invested in "loans and discounts," which when valued as "solvent credits" were found to exactly offset the deposits and other indebtedness.

Treating the appellant in the same way, and rejecting the item $130,746.19, its resources, if assessed as a State bank, would have amounted to the sum of $400,915.13, or $80 per share instead of $116, which the Assessor fixed.

Again the counsel in his figuring loses sight of the fact that the first and principal point to be reached is the relative valuation of the two classes of property; or in other words, the basis from which the Assessor should have

started to make the assessment. Had the appellant been a State bank and been assessed in the same way the commercial State banks were assessed and as in their case allowing deposits to offset credits, the valuation of its resources would have been the sum of the United States bonds $50,000, premium $4,800, money $390,915.13, furniture $5,500, franchise $10,000, or in the aggregate $451,215.13, or $90 per share; and hence, if treated as a State bank, the appellant would have started with an advantage over the condition which it was held to as a national bank, in the difference between $116 and $90, or $26 per share. But if it be conceded that appellant's shares were properly valued, that would not save the assessment when it appears that the State banks were undervalued. We quote from

R. R. & T. Cos. v. Board of Equalizers, 85 Fed. 312.

"Much stress has been placed in argument upon the language of the constitution providing 'that all property shall be taxed according to its value.' Defendants say the proper interpretation of these terms requires that property shall be assessed at its full value, and that unless plaintiffs can show that their own property has been in fact assessed at more than its actual value, it is not open to them to complain that all other property in the State is assessed only at a percentage of its actual value. The contention is that if the assessors have obeyed the constitutional direction, and assessed plaintiffs' property at its full value, it is no just or legal cause of complaint, and no ground for relief, that other assessors have put a taxable value on other property much less than its actual value. There are, however, two sufficient answers to this contention: Conceding, for the purpose of testing the soundness of this proposition, that the

constitutional terms 'according to its value' mean the same thing as 'at its full value,' the contention of the state, then, stated with reference to its effect, is this: That it may assess the property of A. at its full value, in obedience to the constitution, and the property of D. at one-half of its value, in violation of the constitution, and, when A. complains that the result has been to violate the constitution in request to the equality provision, the answer is that the objection is not open to A., because he is taxed on no more than the full value of his own property, and that he must pay 50 per cent more on the same actual value than D. Now, it will certainly be admitted that the simple statement of such a proposition suggests its utter untenableness. If decisions may be found which apparently uphold a result such as this, they promulgate a doctrine which cannot be accepted as good law." (p. 315.)

But if it be true that appellant would not have suffered if it had been assessed as a State bank, then it should also be true that the Bank of California and other State commercial banks would not have suffered if assessed as national banks. The rule should work equally both ways.

Had the Bank of California been a national bank, the Assessor would have started with a fixed, well-known and definite sum, $405 per share. He did start with the sum of $5,906,403 assets and $750,000 valuation of the franchise; but instead of valuing the franchises of the State banks at the difference between the value of the tangible assets and the market value of the shares, he placed a much less valuation thereon. For example: The tangible assets of the Bank of California were valued at $5,906,403.08. Its shares had a market value of $8,100,000. In order then to make a valuation of the corporate property of the Bank of California, or of any other com-

mercial State bank, equal to the value of the shares, the Assessor would have been obliged to add to the tangible assets a valuation of the franchise at the difference between $8,100,000 and $5,906,405.08, but as matter of fact he valued the franchise at $750,000 and added that sum to the tangible assets, making in the aggregate $6,656,403, or $332.82 per share; and hence it is shown the shares of the Bank of California are undervalued in the sum of $73 per share, being the difference between $405 and $332; while at the same time, those of appellant are overvalued in the sum of $26 per share.

But let it be supposed that the Bank of California had been, like the appellant, a national bank whose shares had no recognized market value. Then the Assessor would have proceeded to ascertain the value of its shares from its resources other than real estate and franchise, and he would have found that the resources amounted to $5,412,773.81, or $270 per share. From this amount he would have deducted the United States Bonds $1,203,380.95, and Stocks and Bonds California corporations $1,273,118.86, or in the aggregate $2,476,499.81, leaving a balance of $2,936,264. or $196 per share, and it thus follows that the shares of the Bank of California, valued and assessed precisely as those of the appellant, were treated and under the same conditions would have been assessed at 72 per cent of their value, while taking the shares of appellant, we find are assessed at 90 per cent of their value.

Hence we submit that from every standpoint of consideration and from every point of view, the record shows a plain, unmistakable case of discrimination against the

shareholders of the appellant bank, from which it is entitled to seek relief from the Courts.

In Louisville Trust Co. v. Stone (supra) it is said:

> "The value of the complainant's property, as assessed by the board having authority over the property of such corporations, being the defendants in this case, may be said to be the full cash value of the property. The contention upon this branch of the case is that the state board of equalization, in equalizing the other property of the state systematically and uniformly, and particularly in the years 1897 and 1898, assessed and valued other property at only 70 per cent of its fair cash value. If this is true, there is manifest discrimination against the complainant."

In Cummings vs. Bank, 101 U. S. 153, this Court said:

> "When a rule or system of valuation is adopted, by those whose duty it is to make the assessment, which is designed to operate unequally, and to violate a fundamental principle of the constitution, and when the rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power."

In this connection we again cite

Louisville & N. R. Co. vs. Coulter, (supra).

We recognize the stringency of the rule in cases of this impression; but we submit that this comes squarely within the rule declared by Judge Taft in Taylor vs. N. R. R. Co., 88 Fed. 373, where he said, speaking of the powers of the Chancellor:

> "He can only interfere when it is made clear that there is, with respect to certain species of property,

> systematic, intentional and unlawful undervaluation for taxation by taxing officers which necessarily effect an unjust discrimination against the species of property of which the complainant is an owner."

Here we find that all the State banks were assessed in a way and pursuant to a mode which prevented any equality or the semblance of it, with the valuation and assessment of National Bank shares. Such was the system followed by the Assessor. That it was intentional cannot be denied, and that it was unlawful appears to us established. It was not and could not in the nature of things have been accidental.

Finally, we submit that the Assessor must be held to have known the law and his duty under it, and if, as claimed by counsel, he should have assessed the franchises of the State banks at the difference between the value of their tangible assets and the market value of their shares, then, with full knowledge, he violated a plain and explicit statutory provision and undervalued such property of all the commercial banks to the extent of seventy-five per cent. There does not appear to us any escape from the proposition that appellant was by the assessment in question, put at a great and serious disadvantage.

The counsel for appellee relies with much apparent confidence upon the case of

Bank of Wellington vs. Chapman, 73 U. S. 211.

The case is so radically different in its facts that we wholly fail to see in what respect it can be pertinent in this discussion. There, National and State bank shares were both taxed and valued and assessed in the same

manner; and referring to the Ohio statute and plainly with a view that its decision might not be misunderstood, this Court said:

> "With no purpose to discriminate against the holders of shares in National banks, and with the taxation of the shareholders in the two classes of banks, State and National *precisely* the same, the question is whether this system of taxation in Ohio in its practical operation, does materially discriminate against the National Bank shareholder in the assessment upon his bank shares." (pp. 214-215.)

In Ohio, the Assessor ascertained the value of the shares of both State and National Banks from statements of the resources and liabilities. In California, the Assessor ascertains the market value of the shares of the National bank and determines the value of the resources and the extent of the liabilities of a State bank. The two modes are radically and essentially different and must reach different results.

Finally in conclusion of this branch of the case we submit that the record exhibits the ultimate condition of fact to be that the Assessor, following the statute of California, as he interpreted its commands, has valued the shares of the appellant bank at their full cash value and has valued the corporate property of State Commercial Banks in such way that indirectly the shares are valued at eighty-two per cent of their value.

In Ohio, in the year 1885, proceeding under the statute approved in Bank of Wellington vs. Chapman (supra), bank shares, both State and National, were assessed at sixty-five per cent of their value, while other property was assessed at sixty per cent of its value. This Court held:

> "As regards the allegation of a discrimination against the stockholders on account of the shares held by them, caused by the increase in the assessment of five per centum made by the State Board of Equalization, the matter is not altogether free from difficulty; but we are of opinion that there is such a discrimination as is forbidden by Section 5219 of the Revised Statutes of the United States."
>
> Whitbeck vs. Mercantile Bank, 127 U. S. 193, 195.

If the rule declared in the above case is to be accepted and that it will be we cannot doubt, then we submit that our case is established.

Finally, we desire to again recall the attention of the Court that under the Constitutional provisions in California, a resident national bank shareholder could not be allowed to deduct his debts from the value of his shares, because a share of stock is not a credit; but if a resident were allowed that privilege, a non-resident having debts outside of the State and taxed upon his shares in the State, could certainly have no such privilege, and for that reason and because of that fact, a holder of shares in a State bank would enjoy an advantage.

In Miller vs. Heilbron (supra), the Supreme Court of California said:

> "In making his assessment of plaintiff's shares in the National Bank the Assessor was obliged to pursue the mode prescribed in Section 3640 of the Political Code, and could not deduct from their valuation debts due from here to citizens of the State.
>
> 'Credits' are declared to be property by the State Constitution. They are property in which other 'moneyed capital' is invested than such as is invested in National Bank shares. Yet, as we have seen, the State law, enacted as permitted by Section 1 of

Article XIII of the Constitution, requires the Assessor, in assessing credits, to deduct therefrom all debts due by the party assessed to *bona fide* residents of the State.

"Here is clearly a discrimination against the owner of National Bank shares and in favor of the owner of credits. The former is assessed at a greater rate than is the latter." (p. 138.)

The answer of the counsel, for appellee to the last proposition stated in the opening brief, is in effect that our contention is incorrect, because it would lead to the conviction of the Legislature of California of the commission of an absurdity. The answer would be sufficient if it could be admitted that legislatures are never guilty of enacting absurd laws, but such an admission would surely contravene the facts of history.

Again it is claimed that where two interpretations can be made, that consonant with the evident purpose will be adopted; but the converse of that proposition is true, that where there is but one interpretation to be given, then it must be taken, although the Statute may on that account be defeated of its purpose. The Supreme Court of California said in the case cited by counsel:

> "Where the language of a statute is clear and leaves no doubt as to the legislative intent there is no room for interpretation and judicial discretion cannot break its force, however disastrous the consequences may be." In re Mitchell, 120 Cal. 386.

Here we claim there is no room for construction or interpretation. In Section 3608, it is said that all of the personal assets of a National Bank are exempt from

taxation. The Court had so held in several cases in California.

> First National Bank v. San Francisco, 129 Cal. 98.
> People vs. National Bank, 123 Cal. 53.
> San Francisco vs. National Bank, 92 Fed. 273.

And in Section 3604 it is enacted that the value of all the exempt property shall be deducted from the valuation of the shares. The exact language is as follows:

> "In making such assessment to each stockholder, there shall be deducted from the value of his shares of stock such sum as is in the same proportion to such value as the total value of its real estate *and property exempt by law from taxation* bears to the whole value of all the shares of capital stock in said National bank."

The meaning is clear and it is manifest that the Legislature enacted that from the value of the shares should be deducted the value of the real estate and property exempt by law from taxation, leaving the result as the assessable value of the shares. It will not be allowed, we submit, to say that the "law" mentioned in the section referred only to the Statutes of California, because Section 5219 of the Revised Statutes was as much the law in California as any of its own enactments. Besides, in its Constitution, the State of California has declared the property in question non-taxable.

Section 1, Article XII says: "All property in this "State, not exempt under the laws of the United States, "shall be taxed in proportion to its value." Hence, under the organic law of California, the property was exempt.

It may be conceded that it was a legislative oversight

or mistake, but it is the rule in California that tax laws are to receive a strict construction.

> "All proceedings in the nature of assessing property for purposes of taxation and in levying and collecting taxes thereon are *in invitum* and must be *stricti juris.*"
>
> Weyse v. Crawford, 85 Cal. 196.

Hence, the Court is to follow the language as it is found set forth in the Statute. To do otherwise will, we submit, result in the making by this Court of a law for California which its Legislature may or may not have intended.

However, it is to be said that it is not clear that the Legislature intended to confine the exemptions to those granted by the State of California. The Legislature, it may be admitted, was trying to provide a system by which National Bank shares should be valued at their full value, and State Bank shares should be exempt and only bear the indirect burden of the taxation imposed on the corporate property; but at the same time it was aware and well knew that it must avoid a discrimination. The cases of McHenry vs. Downer, San Francisco vs. C. W. Bank, and People vs. D. O. Mills Nat. Bank had been decided and the law was well understood. Being thus fully advised, it is more than probable that the Legislature concluded that it would tax National Bank shares at their full market value and from that market value deduct the value of the entire corporate property, and thereby and out of that process an assessable value would be reached somewhat equivalent to the percentage of the

assessable valuation of the shares of stock in the State banks.

For example, we will suppose that the Assessor had first ascertained the book value of the shares of appellant to be the sum of its resources divided by the number of shares; he would have found $368 as such value, but at the same time had ascertained that the same shares had a market value of $484, or an excess of 32 per cent as was the case in reference to the shares of the Bank of California, then by following the letter of the law he would have proceeded to deduct the book value of the assets from the market value of the shares, leaving $116 the assessable value and he would have taxed the shares of appellant bank at about the percentage at which the shares of the Bank of California were indirectly burdened, that is to say, at about thirty per cent of the market value.

To state it otherwise, the shares of the Bank of California were indirectly assessed in gross at the sum of $3,061,774, or about $150 per share; they had a market value of $405. Hence they were assessed at thirty-six per cent of their market value. Had the same course been followed in the case of appellant bank with its shares at a market value of $484, its shares would have been assessed, after deducting the value of all the corporate property from the market value of the shares at $116 per share, or about twenty-six per cent of their market value.

We use this illustration to show that it must have been in the mind of the Legislature that Bank shares usually have a market value considerably in excess of the value of their resources.

We know from the record that in the case of the Bank of California, the value of its shares exceeded the value of its resources by the difference between $332 and $405, or $73 per share; and we may be allowed to say, although not appearing in the record, that the fact exists in regard to all Banks in San Francisco which have been established for any length of time. Although in the case at bar it appears that the market value of Appellant's shares did not exceed the value of its resources, and hence under our reading of the law and according to its letter, there was nothing to assess, still that fact cannot militate against the proposition that for the purposes indicated and in order to provide for the taxation of National Bank shares (while not taxing State Bank shares) in such a way as to avoid the objection of a discrimination, it may well have been the intent of the Legislature to provide for the deduction of all the personal assets of the National Banks. This is certainly a reasonable construction and it has the merit of being one which would tend to make out a just, equable, and fair taxation of the two classes of property and avoid the palpable discrimination which now prevails; and finally it would save the Assessor from adjudging the absurdity that a bare franchise of a Bank —the mere right to exist—has a full cash value and would be taken in payment of a just debt from a solvent debtor at such a sum as $2,943,096.92, or twenty-five per cent of the market value of its stock, and at which sum counsel contends the Assessor should have valued the franchise of the Bank of California.

While we do not in any way, or in any degree, waive our contention that the law in question must be held de-

fective because of its total failure to tax bank shares, yet do commend the construction we have now urged as being reasonable and in all probability that which the law makers intended it should have.

It is respectfully submitted that the judgment should be reversed.

WILLIAM S. WOOD,
Counsel for Appellant.

NOTE.

Since the foregoing brief was in print, we have found from an examination of the Annual Report of the Bank Commissioners of California for the year 1900, that in that year the Bank of California had real estate in San Francisco other than the Bank premises of the value, as fixed by itself, of $130,641.41. This sum, added to the value of the Bank premises, gives $380,641.41 as the value of the real estate of that Bank in San Francisco according to its own estimate, all of which was assessed at a valuation of $175,000, or forty-six per cent of the value.

At page 40 we credited the Assessor with having assessed the real estate of the Bank of California and other Commercial Banks at 70 per cent of the real value, and we now suggest that the true percentage was, and should be stated, at fifty per cent. This fact will of course have its effect upon all the other calculations and reduce the percentage of valuation on the property of the commercial banks to less than eighty per cent of the actual or full cash value.